

DRAFT ²

Charlot Thickstun, Director
Division of Elections
Office of Lt. Governor
State of Alaska

June 25, 1991

663-91-0501

465-3600

Courtesy review of pro-
posed applications for
petition to recall the
governor and lieutenant
governor

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CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

I. INTRODUCTION

On behalf of a recall committee proposing to recall Governor Walter J. Hickel and Lieutenant Governor John B. "Jack" Coghill, you have asked us to do a courtesy review of the committee's proposed applications for the recall petitions. Specifically, you requested assistance in determining whether the proposed applications conform to the technical and substantive requirements of AS 15.45.470 -- 15.45.550.

II. THE LEGAL FRAMEWORK OF RECALL

Article XI of the Alaska Constitution reserves to the people three instances of "direct legislation" -- the right to enact laws by initiative, the right to approve or reject legislative enactments through referendum, and the right to recall an elected official. The right to recall is established in article XI, section 8 of the Alaska Constitution and provides that

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[a]ll elected public officials, except judicial officers, are subject to recall by the voters of the State or political subdivision of the state. Procedures and grounds for recall shall be prescribed by the legislature.

The provisions relating to the recall of the governor or lieutenant governor are set out in AS 15.45.470 -- 15.45.720. AS 15.45.500 requires that an application for a petition to recall the governor or lieutenant governor include:

(1) the name and office of the person to be recalled;

(2) the grounds for recall described in particular in not more than 200 words;

(3) a statement that the sponsors are qualified voters who signed the application with the statement of grounds for recall attached;

(4) the designation of a recall committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the recall;

(5) the signatures of at least 100 qualified voters who subscribe to the application as sponsors for purposes of circulation; and

(6) the signatures and addresses of qualified voters equal in number to 10 percent of those who voted in the preceding general election in the state or in the senate or electoral district of the official sought to be recalled.

The grounds for recall referred to in AS 15.45.500(2) are specified in AS 15.45.510. The grounds are: (1) lack of fitness; (2) incompetence; (3) neglect of duties; or (4) corruption.

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A completed application for a petition for recall must be submitted to the director of elections who shall either certify it or notify the recall committee of the grounds for refusal. AS 15.45.540. The director shall deny certification of the application if the director determines that:

(1) the application is not substantially in the required form;

(2) the application was filed within the first 120 days of the term of the official subject to recall or within less than 180 days of the termination of the term of office of any official subject to recall;

(3) the person named in the application is not subject to recall; or

(4) there is an insufficient number of qualified subscribers.

AS 15.45.550.

If the director certifies an application for recall, petitions are then prepared for circulation. AS 15.45.560.

III. TECHNICAL REVIEW OF THE PROPOSED APPLICATIONS

You have supplied us with a copy of a signature form which the Hickel/Coghill recall committee intends to mail (or otherwise distribute) to qualified voters in the state for the

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purpose of obtaining the necessary addresses and signatures of sponsors/subscribers (hereafter "sponsors") for each application for a recall petition as required under AS 15.45-.500(6). 1/ We have several comments with respect to the proposed method of gathering signatures of qualified voters to meet the requirements of AS 15.45.500(6) as well as legal concerns with respect to the proposed signature form.

A. Method of Gathering Signatures

The Hickel/Coghill recall committee proposes to distribute a two-part signature form, with the upper half containing the petition application for the recall of Walter J. Hickel and the bottom half containing the petition application for the recall of Jack Coghill. Rather than having individuals personally gather the signatures and addresses of 19,754 qualified voters to serve as sponsors for the application, the committee proposes to mail (or otherwise distribute) the form to registered voters to complete and mail back to the committee. The instructions on the form also state that the form may be duplicated and given to other registered voters to sign and mail back to the committee.

1/ AS 15.45.500(6) requires the application to contain signatures and addresses of qualified voters equal in number to 10 percent of those who voted in the preceding general election. Evidently, 19,754 addresses and signatures of qualified voters must be obtained in order for the application to be complete.

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The committee correctly points out that AS 15.45.500 does not require that an application for a recall petition be circulated only by a sponsor and only in person in order to gather the required percentage of addresses and signatures of registered voters in support of an application for a recall petition. 2/ And, while we have concerns with respect to the integrity of a "by-mail" signature gathering process, noting the potential for forgeries (due to lack of a sponsor witnessing the signature of a recall supporter), we must balance these concerns with the Alaska Supreme Court's ruling in Meiners v. Bering Straits School Dist., 687 P.2d 287 (Alaska 1984), in which the court stated that statutes relating to the recall of elected officials are to be liberally construed in favor of the people's right to exercise recall. The Court in Meiners also stated that the purposes of a statutory process providing for the recall of elected officials are not well served if artificial, technical hurdles are unnecessarily created as part of the process. Id. at 296. Accordingly, we conclude that the Alaska Supreme Court would find in favor of the recall committee's proposed method (provided, of course, no fraud is found and the forms are completed correctly).

2/ In contrast, the law specifically requires that a "petition" for recall may be circulated only by a sponsor and only in person. AS 15.45.580.

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When the required number of signature forms for each petition have been returned to the recall committee, the committee must then compile the signed forms for submission to the division of elections with the other portions of the applications for recall. 3/ The two-part signature form must be separated to accompany the respective applications for the recall petitions.

B. Instructions on the Proposed Signature Form

As to the instructions provided on the proposed signature form, our initial criticism is that the form does not apprise potential sponsors that they are not required to support the recall of both public officials in order to be a sponsor. To the contrary, the materials lead to an inference or conclusion that a sponsor must support the recall of both officials. However, potential sponsors ordinarily have the following options:

- (1) support the recall of Governor Hickel only;

3/ It is the responsibility of the recall committee to submit the required signature forms, containing the number of sponsors required under AS 15.45.500(6), with each application for recall. The signature forms cannot be submitted individually to the division of elections as it is not the responsibility of division personnel to keep track of the forms and put together the application for the petitions for recall. Failure of the committee to separate the forms and attach the signed portions to the appropriate application will result in rejection of the application by the division accepted as incomplete. The committee has been made aware of this requirement and there is no objection.

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(2) support the recall of Lieutenant Governor Coghill only;

(3) support the recall of both public officials; or

(4) not support the recall of either public official.

Due to the failure to make these options clear on the two-part form, we believe this will be confusing to the potential sponsor who may believe that the recall effort is joint -- that if the governor is recalled, then the lieutenant governor is also recalled. As pointed out above, the applications for petitions for recall of Governor Hickel and Lieutenant Governor Coghill are separate applications and each application must satisfy the requirements of AS 15.45.500. Even though the governor and lieutenant governor candidates run jointly in the general election, once elected they are subject to recall individually. However, the proposed two-part signature form infers that a person "must" support the recall of both officials in order to sign as a sponsor. The "Note" appearing on both parts of the proposed signature form reads:

Sign both portions of this application. Do not separate page. It will make it easier for whom ever checks the signature to verify both at one time. It is OK to make copies of this blank form and get other registered voters to sign. You will automatically be qualified (but not required) to circulate the next set of petitions which will

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be prepared and issued by the Division of
Elections."

(Emphasis added).

We recommend that the instructions on the form be amended to apprise potential sponsors of their options. 4/ Additionally, in the event the applications for recall of the governor and lieutenant governor are both certified, we caution the recall committee to make certain that a sponsor is qualified to circulate both recall petitions (if the intent is to have a person circulate them together) under AS 15.45.580. For example, if a person becomes a sponsor for the recall of Governor Hickel only (having signed just the top half of the application form in support of the recall petition of Governor Hickel), AS 15.45.580 restricts that person to circulation of a petition for recall of Governor Hickel. That person may not circulate a petition for recall of the lieutenant governor since s/he is not a sponsor of that petition.

Finally, we understand that the committee has amended the bottom half of the form referencing the recall of Jack

4/ On June 24, 1991, we spoke with Howard Scaman who has informed us that the instructions have been changed to make clear that a person has the option to sign one or both portions of the application.

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Coghill by deleting "From the Office of Lieutenant Governor or Governor (Whichever office he might hold at the time of the Recall Election)". The form now simply states "From the Office of Lieutenant Governor". Given the amendment, no comment from this office is necessary regarding the questionable legality of the previous language.

IV. SUFFICIENCY OF GROUNDS FOR RECALL - AS 15.45.510

A. Introduction

When the director of elections reviews an application for a recall petition (AS 15.45.540), the director's review includes a review of the grounds asserted on the application. A major purpose of the director's review is to determine if the allegations set forth in the proposed petitions are sufficient grounds for recall under AS 15.45.510. 5/ The grounds for recall must be described "in particular" in not more than 200 words. AS 15.45.500(2). Under AS 15.45.550, the director will deny certification of an application if, inter alia, it is determined that "the application is not substantially in the required

5/ See Meiners v. Bering Strait School Dist., 687 P.2d at 300 n.18 (in making this determination, the director is not required to make significant discretionary decisions of a legal nature nor is the director called upon to assess the truth or falsity of the allegations made).

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form." AS 15.45.550(1). The grounds for recall are part of the required "form" of the application under AS 15.45.500. 6/

To date, the only ground for recall construed by the Alaska Supreme Court in reviewing the sufficiency of allegations in a recall petition is the "failure to perform prescribed duties," as applied to the recall of municipal officers or school board members under AS 29.26.250. 7/

Based primarily on the Alaska Supreme Court's analysis of the recall process in Meiners, this office has previously advised that allegations of "incompetence" must allege conduct that voters could conclude calls "into question the ability and fitness of the [public officer]" to discharge the duties of office. See 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393); 1988 Inf. Op. Att'y Gen. (Apr. 22; 663-88-0462).

6/ See Steadman v. Halland, 641 P.2d 448 (Montana 1982) (the statement of grounds for recall which must be included in a recall petition is part of the form of the petition).

7/ "Failure to perform prescribed duties" is not a ground for recall of the governor or lieutenant governor under AS 15.45.510 and none of the grounds for recall in AS 15.45.510 have been defined by the legislature. However, Meiners is the seminal case on recall in this state and the court provides a detailed analysis of the recall process as envisioned by the constitutional framers which is equally applicable to a recall under AS 15.45.500 as to a recall under AS 29.26.250. Meiners, 687 P.2d at 300.

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Finally, it is important to note that AS 15.45.500(2) requires that the grounds for recall be described "in particular". The Alaska Supreme Court has explained that "[t]he purpose of the requirement of particularity is to give the officeholder a fair opportunity to defend his conduct in a rebuttal limited to 200 words". Meiners, 687 P.2d at 302; AS 15.45.680. The court held that allegations that do not state grounds for recall must not be included on the ballot, because inclusion of those allegations

might force the target official to expend most of his 200 words of rebuttal fending off charges, which although legally insufficient for recall, he fears might garner the voters' attention. It invites abuse; it invites the drafting of recall petitions with little regard for the statutory grounds for recall.

Id. The requirement of particularity enables the sponsors, the director of elections, and ultimately the voters to pinpoint the alleged justification for recall. Due to the requirement to state grounds with particularity, we believe that the recall committee's comment following the allegations on the proposed form is improper and should be deleted. That comment reads:

Note to Sponsor/Subscriber: These are the GROUNDS for recall and meet the legal requirements for placing the question on the ballot. There are hundreds of different individual REASONS for want-

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ing the recall . . . These will be the subject of public debate when the recall campaign begins.

B. Grounds for Recall - Governor Hickel

The proposed application for a recall petition to recall Governor Hickel sets out a number of allegations regarding his conduct as follows:

1. He is unfit for office because of lapses in memory and frequent total reversals of decisions which exceed the normal bounds of sound judgement. He has used the Office of Governor to intimidate individuals seeking to disclose information about his unlawful "nomination by the Alaskan Independence Party." 8/ He has used the Office of Governor to promote a gas pipeline which will benefit him personally.

2. He is incompetent in the selection of nominations for Boards and Commissions and has negotiated contracts and agreements such as the rejected Exxon settlement which are not in the best interests of the majority of Alaskans.

In summary, there are three basic allegations asserted on the application for the recall of the governor: (1) that the governor is unfit for office due to lapses in memory and reversals of decisions; (2) that the governor has used his office to promote a benefit for himself; and (3) that the governor is

8/ In a recent conversation with Howard Scaman, of the Coalition to Recall Hickel/Coghill, we were informed that this allegation (using the office of governor to intimidate those seeking to disclose information regarding his nomination) is being deleted in the final version of the application.

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incompetent as evidenced by the exercise of certain discretionary acts (appointment of members to boards and commissions and participation in contract and settlement negotiations).

In light of our earlier opinions and the liberal construction to be given recall statutes, we believe that the Alaska Supreme Court would find that the allegation of lapses of memory may suffice to allege lack of fitness of the governor. However, we do not believe it states facts sufficient to satisfy the requirement that grounds for recall must be stated with particularity. AS 15.45.500(2) requires the grounds for recall be "described in particular." The more conclusory statement of memory lapses is not particular enough to allow a voter to make an informed decision. More importantly, the lack of particularity does not allow the office holder to effectively respond to the allegation as permitted by AS 15.45.680. Specific instances of memory lapse should be included to satisfy the particularity requirement.

We do not believe that alleging the governor has used his office to promote a gas pipeline to benefit himself, constitutes an allegation of unfitness for office.



ANACMA

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Finally, with respect to Allegation 2, we have serious doubts that this allegation of incompetence would be upheld by the Alaska Supreme Court as alleging conduct that voters could conclude call into question the ability and fitness of the governor to discharge his duties. The appointment of members to boards and commissions is purely a discretionary power of the governor. Additionally, the governor's power to negotiate contracts and settlements is also a discretionary power. While our supreme court has not directly addressed the issue of whether the discharge of discretionary acts by a public official can be the basis for a recall petition, the Supreme Court of Washington has consistently held in recent years that an elected official exercising discretion in the discharge of duties cannot be recalled on that basis. For example see In re Zufelt, 774 P.2d 1223 (Wash. 1989); Teaford v. Howard, 707 P.2d 1327 (Wash. 1985); Recall of Esty v. Dempsey, 707 P.2d 1338 (Wash. 1985); Chandler v. Otto, 693 P.2d 71 (Wash. 1984); Cole v. Webster, 692 P.2d 799 (Wash. 1984).

While we cannot state with certainty that our supreme court would follow the Washington court's reasoning on this issue, we simply wish to express our concern to you and the recall committee as to the questionable legality of Allegation 2.

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Re: Grounds for Recall -- Lieutenant Governor Coghill

The proposed application for a recall petition to recall Lieutenant Governor Coghill alleges as follows:

1. He is incompetent as witnessed by his wholesale replacement of the division of elections staff, leaving only inexperienced, untrained, and unknowledgeable employees to provide service to the voters, and his public acknowledgement that he has not even read the Election Laws, as well as contradictory public statements regarding his involvement and knowledge of the recall process.

2. He is unfit for office because of unethical and unprofessional conduct as indicated by his totally unfounded public accusations of criminal activity of recall staff; references to carefully researched and deliberated action by the League of Women Voters of Alaska as "crazy"; and, he has used the Office of Lieutenant Governor in an attempt to intimidate individuals seeking to disclose information about his unlawful "nomination" by the Alaskan Independence Party. 2/

With respect to Allegation 1, the allegation that Coghill is incompetent based upon the wholesale replacement of staff at the division of elections concerns an act for which the lieutenant governor may legally exercise his discretion. By law, the lieutenant governor heads the division of elections. AS 15.10.105. The decision regarding who is employed at the division of elections rests solely with the lieutenant governor.

2/ According to Howard Seaman, this last allegation is being deleted in the final version of the application.

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And, all employees of the division of elections are in the exempt service, meaning, they are employed "at-will". AS 39.25.120. As stated above, we have serious doubts that a public official's exercise of a discretionary act will suffice as grounds for recall under AS 15.45.510 if challenged.

With respect to the allegation that Lieutenant Governor Coghill has admittedly not read the election laws or has made contradictory statements regarding the recall process, we are doubtful this allegation alleges conduct that calls into question the ability and fitness of the lieutenant governor to discharge the duties of office and we recommend it be deleted. However, we cannot state with certainty, that if challenged, the Alaska Supreme Court would agree with our conclusion.

We do not believe that the facts alleged in Allegation 2 constitute a legal showing of the Lieutenant Governor's lack of fitness for office. While the legislature has not defined "lack of fitness" or "unfit" for the purposes of recall, Black's Law Dictionary, 5th Ed., defines "unfit" as unsuitable; incompetent. An allegation that Coghill is unfit for office corresponds to an allegation that he is incompetent. We do not believe that a public officer's . . . "unfounded public accusations of criminal activity against recall staff" or his reference to a particular

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report by the League of Women Voters as "crazy," necessarily calls into question the ability and fitness of the public officials's to discharge the duties of his office. It is merely an opinion.

While not alleged here, if the grounds for recall or Allegation 2 were "misconduct in office," we would advise that misconduct in office is something more than just conduct or adherence to policies with which the recall committee disagrees. There must be some element of unlawfulness to the conduct. See 1988 Inf. Op. Att'y Gen. (Apr. 22; 663-88-0462). In conclusion, there is no element of unlawfulness nor is there an inference to be drawn that the lieutenant governor is incompetent or unfit for office based upon an alleged facts that the lieutenant governor expressed an opinion as set out in Allegation 2. We recommend it be deleted from the petition. 10/

The purpose of this opinion is to provide you with a non-binding, preliminary review of the proposed application for recall as submitted to you by the Hickel/Coghill recall committee

10/ Director has authority to delete portion of recall petition that does not sufficiently state grounds for recall. Meiners, 687 P.2d at 302-3.

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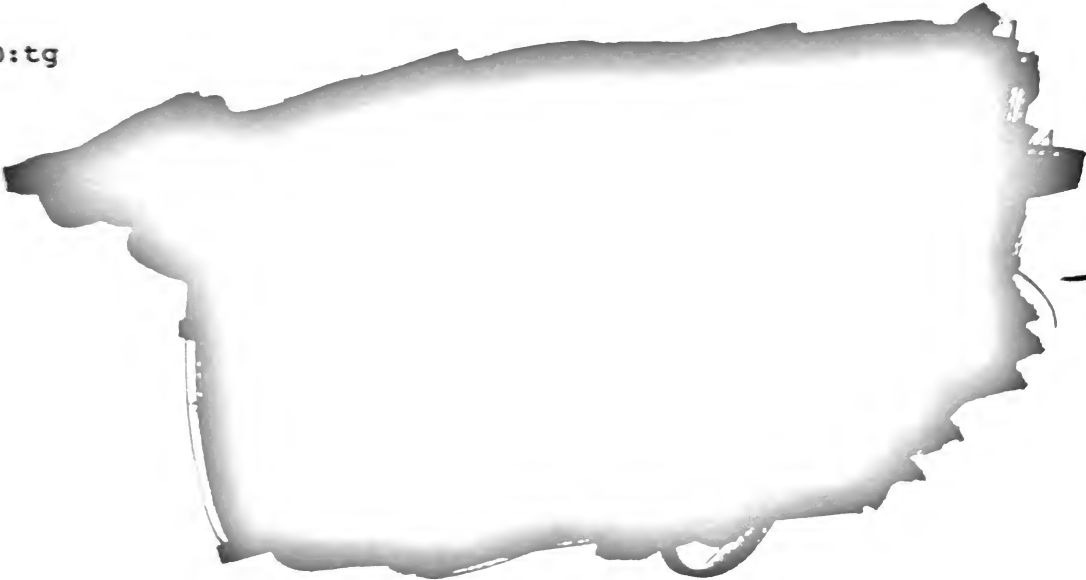
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on May 23, 1991. 11/ If and when a completed application for recall is received by your office, we will conduct a formal review at that time which may encompass more than that stated in this courtesy review.

If you have further questions, please call us.

MLO:tg



11/ It is our understanding that the final version of the recall committee's application is substantially different from the draft application dated May 23, 1991.